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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 CR 683(LAP)

CHUCK CONNORS PERSON and
RASHAN MICHEL,

Defendants.

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New York, N.Y.
January 29, 2019
11:00 a.m.

Before:

HON. LORETTA A. PRESKA,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
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Southern District of New York
ROBERT BOONE
ELI J. MARK
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BY: JONATHAN BACH

(Case called)

THE COURT: United States v. Person.

Is the government ready

MR. BOONE: Yes, your Honor.

Robert Boone for the government. With me at counsel's table is Eli Mark and Aline Flodr.

THE COURT: Good morning.

Is defense ready.

MS. TRZASKOMA: Yes, your Honor.

Theresa Trzaskoma from Sher Tremonte on behalf of Mr. Person. With me here today is Michael Gibaldi and Emma Spiro.

Mr. Person waives his appearance at this.

THE COURT: Yes, ma'am.

MR. BACH: Good morning, your Honor.

Jonathan Bach on behalf of Mr. Michel, who waives his appearance.

THE COURT: Yes, sir. Good morning.

Counsel, I guess the first item on the table is the request for the bill of particulars.

I must admit that there seems to be an awful lot of information disclosed in the complaint, the indictment, and the discovery. I am a bit at a loss as to why the defense feels that they are entitled to a bill of particulars.

MR. BACH: I'm happy to address that, your Honor.

THE COURT: Yes, sir, Mr. Bach.

MR. BACH: So there is a tremendous amount of material produced in discovery in this case, and it is a lengthy talking indictment. The bill of particulars goes to --

THE COURT: I'm going to ask you to keep your voice up, if you would, Mr. Bach.

Let me give it a try.

(Pause)

Go ahead.

MR. BACH: Thank you, your Honor.

There was a tremendous amount of material produced in discovery, and it is a lengthy talking indictment. There is no question about that. The bill of particulars goes to two very broad almost generic terms. The terms are business and transaction.

What the defense wants to know is what does the government consider, among this large volume of material, to be the business or transaction that they intend to pursue in this case. Those terms have such a broad application, almost any conduct could be described as transaction.

THE COURT: The government wrote a letter, which you pointed out in your papers, dated July 13, talking about "the business of Auburn University, namely with respect to the conduct of Auburn University's basketball program."

We know what the government thinks the business is.

MR. BACH: I agree with your Honor. We raised the question whether that was the business or whether there would be other business or other transactions. The government declined to answer that question in advance of our motion.

THE COURT: The government doesn't have to tell you every single transaction, does it?

MR. BACH: If there are transactions that it contends constitute the crimes, are essential facts of the crimes, it has to tell us that either in an indictment or, failing that, in a bill of particulars.

In this case, there was no to wit clause in the indictment, as one might typically find, that defined the transaction or the business at issue. The government did supplement with a letter which provided some information, but declined to state that that is what it was limiting the essential facts of this case to.

We're entitled to the essential facts of the charges that we have to defend against. Not the minutia of discovery, not the minutia of evidentiary proof, this is partly one, but the essential to wit, what are the businesses or transactions that they are going to tell the jury constitute the crime.

THE COURT: Tell me again why the letter isn't sufficient on the business issue.

MR. BACH: If the government is prepared to represent to the court today that that is the business they intend to

base their case on, it suffices.

THE COURT: What about all those cases that say it is not the job of the bill of particulars to limit the government in the evidence it may present?

MR. BACH: Judge, we are not attempting to limit the evidence they can present. What we're asking for is a clear statement of what the charges are. What is the essential fact, not the evidence that they will use to prove that fact. But what is the to wit, how do they define business or transaction that this trial is going to be about.

They have defined business in one way. That they've done, but they have declined to say that that is the only way they plan to define it. That is why we filed the motion.

THE COURT: All right. Mr. Boone, Mr. Bach says that the government is required to state that the business identified in the letter dated July 13 is the only business that the government intends to present proof on.

MR. BOONE: Yes, and that is incorrect, your Honor.

As we noted in our brief, defendants don't cite to a single case that says that. They don't cite to a single case in which the request they are seeking has been granted, and I think it is because it is pretty clear black-letter law that what your Honor suggested is correct, which is that the government doesn't have an obligation to explain its theory and limit itself when we're now, I think, maybe five months out of

trial as to what we can present at trial.

Also, just to circle back, what Mr. Bach has conceded in his papers and again here today is that we have told them what at least one of the business transactions is. It has also been the subject of briefing in this case, in particular, in regards to the motion to dismiss, and that is that it is our view that Auburn's mission was to run an NCAA compliant program and that the paying of Mr. Person to essentially not run an NCAA compliant program was a business of Auburn.

Then also, your Honor, just to add a little bit more color to this, obviously the government will not sort of seek to introduce anything that has not been already given in discovery and the review of discovery makes it pretty clear what the options are in terms of business or transactions. Most of discovery involves wiretap communications involving either Mr. Bach's client or Mr. Person himself.

In terms of the documents produced in discovery, those documents relate to the athletic program at Auburn University, things such as the contract of Person, certain certification forms related to his NCAA eligibility. It is not a terribly difficult case in terms of there is lots of different tentacles here. I think it is pretty clear we are not referring to some sort of merger or business, some sort of transaction involving Auburn that hasn't been produced in discovery.

THE COURT: Mr. Bach says, though, with respect to the

transactions, that he is entitled to know every transaction, he is entitled to have the government spell out every transaction that it will assert was unlawful.

MR. BOONE: Again, your Honor, there is no case law to support that. That is just not what the case law says.

Obviously it would be helpful to the defense, and there is case law that makes it clear, just because it is helpful, doesn't mean defense gets it. But there certainly is no requirement that in every fraud case, the government must lay out every potentially fraudulent transaction or transaction that is going to be at issue in the trial.

THE COURT: Mr. Bach, Mr. Boone says that anything the government is going to rely on is included in the discovery materials in any event. You're not entitled to a specific listing of everything.

Why is that wrong?

MR. BACH: Well, it is wrong for two reasons, your Honor.

Number one, there is so much in the discovery that could be characterized as a transaction or as a business that we don't have fair notice of what it is they are going to assert.

THE COURT: How can that be true?

I mean, if there is something in there where one of the defendants is ordering coffee, nobody thinks that is in any

way related to the charges here.

But there has been a general description of the charges and several specific examples. I don't understand why that is not enough.

MR. BACH: Because, your Honor, the government has told the court that it is not limiting itself to the general description it just gave.

THE COURT: What do you rely on to say that the government must set out every single transaction it might assert was illegal?

MR. BACH: I rely on Rule 7, which by its plain terms requires the charging document to state not just the elements of the offense, but the essential facts. That is Rule 7(c). Rule 7(f), which is also --

THE COURT: That is different from every single fact and every single detail, which is clearly not the law.

MR. BACH: Absolutely right, your Honor.

I am not asking for every detail. I am not asking for every fact. What I'm asking for is what the government typically provides in its charging documents, a to wit clause.

THE COURT: That is not the test either.

MR. BACH: It is not the test, but I am trying in a vernacular to explain, I am not asking for an exhaustive list here. I am not asking for evidentiary detail. What I am asking for is as in a drug case, there would be a to wit clause

that gave some particularization of what set of transactions or what the neighborhood was or something very general.

THE COURT: What the neighborhood is is very different from every single transaction. You've got more than what the neighborhood is here and you certainly have got some transactions.

MR. BACH: Judge.

THE COURT: Even in a drug case, the government doesn't have to list every single transaction.

MR. BACH: I'm not asking -- let me be clear.

THE COURT: Yeah, you are.

MR. BACH: Let me be clear. If I miscommunicated, I apologize.

I'm assuming that the government is either going to limit its proof to the way it has also characterized the business. They are not saying they are, but I am assuming there is a good chance they will do that. If they don't, if they go beyond that, my strong sense is the likelihood is that they are only going to go beyond it with two or three or four particular transactions that they'll seek to prove to the jury. I want to know those. I want to know the ones that --

THE COURT: I know that would be helpful. I don't see that it is necessary.

MR. BACH: Judge, we made our motion on the ground that that would be an essential fact for the defense.

THE COURT: Thank you.

Counsel, do you want to add anything?

MS. TRZASKOMA: Not on this, your Honor.

THE COURT: Yes, ma'am.

All right. I find that the defense is not entitled to a bill of particulars here. The material in the very detailed complaint, the material in the, if not speaking, shouting superseding indictment, and the voluminous discovery here are certainly sufficient for the defendants to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy, should the defendants be prosecuted a second time for the same offense.

I also note the government's agreement that any transactions that will be alleged to have been illegal have been the subject of documentary discovery. So that motion is denied.

Counsel, with respect to the various motions to suppress, I think some of it might have been covered in the memorandum denying the motion to dismiss the indictment.

MS. TRZASKOMA: Yes, your Honor.

I do believe that there were certain aspects of our arguments that have been resolved as a result of your Honor's decision on our motions to dismiss, but I believe that with respect to both the wiretap motion and the motion to suppress, there are certain of the cell phones, there are still remaining

issues.

THE COURT: What would you like to be heard on?

MS. TRZASKOMA: Your Honor, I would like to be heard on both the wiretap issue and the search warrant issue.

THE COURT: Yes, ma'am. Go ahead.

MS. TRZASKOMA: With respect to the wiretap issue, one of our principal arguments is that a wiretap, under the circumstances of this particular investigation, was entirely unnecessary. And the reason for that, as we have laid out in our papers and I won't belabor the points here, but I do want to make sure that the overall context is clear.

The government had a cooperating witness. That cooperating witness hatched this entire plan, devised the elements of the plan, executed the plan, and was successful in providing the government with all it needed to investigate the offenses that have been alleged here.

THE COURT: Passing the characterizations, what do you say to the argument made in the government's brief that the cooperating witness could only tape, if you will, conversations in which he participated, and yet there were other conversations, including between, for example, Mr. Person and the parents, that there was no way the cooperating witness would be able to hear those conversations?

MS. TRZASKOMA: I have two responses to that, your Honor.

The first is that theory of why you need wiretap is nowhere articulated in the explanation in the wiretap application.

The wiretap application makes very clear -- and it is really the heart of what we're concerned about, which is on page 55 of the first wiretap application -- the description of why confidential informants and cooperating witnesses are insufficient. The government said we need the wiretap because we need evidence of additional ventures, additional payments, additional schemes.

The second issue is that at the time the government applied for this wiretap, Mr. Person, according to the application itself, had already set dates for the government's cooperator to meet with a player and to meet with the family. So to the extent they needed evidence of the steering, which are the acts that are the quo here, they were getting that.

Mr. Blazer, the government's cooperator, was going to meet, and did meet, directly with the players and with their families. Under those circumstances --

THE COURT: I'm looking at page 56 at the bottom, a cooperating witness, such as CW-1, who was only involved in one aspect of the activities, in particular, the Person bribery scheme, but does not have full visibility into all of Michel's activities, is likely to have great difficulty obtaining evidence about the full scope of Michel's payments to college

coaches and/or current college athletes.

MS. TRZASKOMA: Well, Mr. Bach can respond to whether that was sufficient for purposes of obtaining a wiretap on Mr. Michel's phone, but as to Mr. Person, there was no evidence anywhere that Mr. Person was involved in any scheme other than the one that the government had cooked up.

And, in fact, at this point, all of the evidence, including what is detailed in the wiretap application, is that Mr. Person was not involved in any additional ventures, additional payments, or additional schemes.

Mr. Michel presented Mr. Person to the government's cooperator as someone who needed a loan.

THE COURT: Counsel, may I impose on you for five minutes?

MS. TRZASKOMA: Yes, your Honor.

THE COURT: Thank you.

(Recess)

THE COURT: Counsel, thank you for your consideration.

You were telling me that, at the time in question, there was no evidence that your client was involved in any other scheme, is that right?

MS. TRZASKOMA: That's correct, your Honor.

The scheme that was being led by the government's cooperator was fully known to the cooperator through the cooperator. The cooperator --

THE COURT: I don't think you can say fully known, can you?

MS. TRZASKOMA: I believe --

THE COURT: We don't know who the parents were or any of that.

MS. TRZASKOMA: Mr. Person, according to the wiretap application at the time, Mr. Person -- and this is on page 45 and 46 -- well, starting at 44 in the December 1, 2016 consensual telephone call -- Mr. Person informs the government's cooperator that he had planned a meeting with a particular player and had named other players.

Then on a December 2 call, Mr. Person again identified the mother of a player and indicated that there had been a meeting set up at Mr. Person's home on December 18.

So at the time of this wiretap application, your Honor, the government, from soup to nuts, knows what this is about and has access --

THE COURT: But you can't use the word fully informed.

MS. TRZASKOMA: Well, your Honor, what I would say is that the wiretap application does not comply with the requirements of Title III because it does not tell the reviewing judge why exactly the cooperator is not sufficient. I think it actually is inaccurate, because in the description on pages 55 through 57 of why the cooperating witness is insufficient with respect to Mr. Person, there is nothing in

there that says what the cooperating witness can't get.

THE COURT: OK. Mr. Boone, what could the cooperating witness not get and where is it in the affidavit?

MR. BOONE: Your Honor, what he could not get is conversations that he is not part of. If you look at the objective of the wire, which is on page five, it lays out what the point of the wire is, which includes identifying all targets and subjects and accomplices involved in the investigation, which are defendant obviously wouldn't be aware of because he doesn't know who Michel knows and he doesn't know necessarily who Mr. Person knows.

Your Honor, just to sort of take a step back, two things. One, obviously it is not the case that you can only get a wire if you're looking to investigate crimes you don't already know. Obviously the wire is explaining the very beginning stages of an investigation to correct what defense counsel has said. Mr. Michel came to the cooperator with this opportunity. He is the one who knows person. The person doesn't know who Chuck Person is.

If you read the affidavit, when they are initially talking, he is not even sure who Michel is talking about. Michel is the one who is informing him about a connection he has to a basketball coach and how that coach has informed him that he would be interested in taking money in exchange for steering players. It is very clear, I think, in the first

conversation they have.

Obviously this is not something that sort of is driven by the cooperator. He is controlling all aspects of it. He is receiving information from Michel about Person, and he ultimately receives information about person regarding what they want to do, what they want to be involved in.

But to sort of anchor us a little bit more, your Honor, the law doesn't require that we lay out sort of investigations we are not aware of and have that be the basis for a wire. In terms of necessity, as we've said in our brief and looking at page five of our response to their motion, the statute only requires that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods. That is it.

It doesn't require you explain who your cooperator can talk to, who they can't talk to. It requires us to explain difficulties in normal methods and we have done that. We made it clear that we talked about over a dozen methods, including the use of the cooperator and explained why that is difficult.

As your Honor pointed out, what we suggested was correct because, in fact, there were conversations that happened that were crucial to the scheme that our cooperator was not a part of. A large part of the proof that we will have to show is that not only that Mr. Person take money, but that

he actually did something in exchange for that money.

The conversations he has had with the parents to encourage them to retain the services of our cooperating witness are crucial evidence. That is the quo in the case. He obviously is not going to be able to be party to every conversation that Mr. Person is having with the parents, he doesn't even know who they are, but what Mr. Person actually wants them to do and what he is actually pushing them to do. That is essentially what the case is about.

So yes, obviously Mr. Person can be there in the few instances in which they meet, and there aren't very many frankly in which they meet, between him and the parents. He can't be there when Mr. Person is really doing the groundwork of what he has agreed to do, which is use his already existing relationship with the parents to push them to the cooperating witness. So obviously that is a huge reason why this was necessary.

Just briefly, your Honor, on the point that there was no evidence of other investigations -- I'm sorry -- of other schemes that were sort of afoot. It is not true. It is very clear in the affidavit itself. If you look, for instance -- I'll just go over a few of these. If you look, for instance, on page 22 of the agent's affidavit, Michel says -- Michel basically infers that he has connections to what we call coaches who may be interested in participating in a similar

scheme. He says, The good thing about it is, I've got all the college coaches right now because, guess what, I'm the one that is with them. I make all their suits.

He talks about having access to the locker room, access to the kid and everything. He talks about the money that is in basketball and how he can get ten players. He basically is good financially for the next five years and doesn't have to do anything.

Similar conversations continue. If you look on page 26, here Michel is essentially discussing with CW-1 that if he doesn't want to go forward with Person, it is fine. They can go in a different direction. He says, If you can't do it, just tell me. I can go in a different direction. We will still be able to get the players. Obviously he is talking about the scheme.

And Mr. Person himself discusses his interest in expanding the scheme. If you look on page 49 of the agent affidavit, Mr. Person is talking with the cooperator, and he is talking about how he would like to continue this in the future. He says, If I can supplement myself and be able to stay at Auburn and make it work, then I could stay and not go looking somewhere else. We explained that he had been considering leaving the program. Here, he is talking about expanding their scheme so that, in years to come, he can supplement his income in a way that will make it sort of worth his while financially.

So, again, your Honor, just at the risk of belaboring the point, this is the first wire of many wires. This the beginning of the investigation. This isn't the last wire. Obviously, at this point, a lot of things haven't happened, like I pointed out in our brief.

Mr. Persons only got a portion of the money that he asked for. None of the meetings have happened with the parents. So the need for the wire to both understand the extent of the conspiracy, the potential coconspirators, potential other schemes, this is evident.

THE COURT: All right. Counsel, what do you say to that?

MS. TRZASKOMA: Well, your Honor, I think what I say to most of that is that that may be true that there are indications in the wiretap application that Mr. Michel was involved and had other potential schemes afoot, but I do not believe there is anything, including what is on page 49, that indicates that there were additional ventures and additional schemes as the government suggests.

What Mr. Person was saying on page 49 to the cooperating witness is that maybe that he would continue doing this with the cooperating witness, which, again, proves that the government has -- by having access to Mr. Person through its cooperating witness, it has no need for a truly invasive wiretap, where the government is going to obtain and listen to

every single phone call, including Mr. Person's most intimate communications. That is really the heart of Title III, which is that it is allowed only when it is necessary. That is what the law says.

So the question is, would it be helpful, would it give the government more information. That's not meeting the necessity requirement.

THE COURT: Well, all right. I got it. Thank you.

MS. TRZASKOMA: Thank you, your Honor.

On the search warrant, I don't know if your Honor --

THE COURT: Let me just say, with respect to this initial wiretap application, the fact that the names of some of the players or some of the parents were volunteered to the cooperator in no way diminishes the need to have a wiretap on the phones in order to identify other participants in the scheme and, more importantly, what the participants propose to do; the steering of the players, the steering of the parents. There is absolutely no way that could be done.

MS. TRZASKOMA: Your Honor, I beg to differ with that. Basketball has a very limited number of players, and the players who have the potential to go play in the NBA is an even smaller number. So at any given time, and in this particular season, Mr. Person had two or three players, and he identified all of them to the cooperating witness.

THE COURT: That doesn't help with the problem of

figuring out what he said to them or what he said to the parents in an effort to steer them to the preferred vendors.

MS. TRZASKOMA: Your Honor, I would just go back to the question of necessity, and title --

THE COURT: It is not the law that the agents have to exhaust every single investigative technique before asking for a wiretap.

MS. TRZASKOMA: Your Honor --

THE COURT: Excuse me for interrupting you.

MS. TRZASKOMA: Yes.

THE COURT: But it is wholly foreseeable that after observing what was going on, that the details of the scheme would be disclosed in the phone conversations and texts between and among these participants. That is all that is required.

MS. TRZASKOMA: Your Honor, I would just go back to the Lilla decision, which is a Second Circuit case, that if it has any application, it applies in these circumstances. That was a case where there was an Upstate state trooper who learned that a particular defendant was selling drugs. He went and purchased drugs and heard from the defendant that there were more drugs coming, and he sought a wiretap application.

The court basically said what I am saying here, which is you have regular investigative techniques. They are successful, as they were in this case, and under those circumstances, you don't need a wiretap.

THE COURT: I disagree. The Lilla case, 699 F.2d 99 (2d Cir. 1983) is nothing like this case. That was a narcotics case. It wasn't even a particularly complicated one. Indeed, I think the court characterized it as a "small-time narcotics case."

That is nothing like the scheme that is alleged and the scheme that was being investigated here where, among other things, it was necessary to find out what the participants were saying to the parents, as counsel noted, the quid pro quo. They are wholly different types of cases, and the Lilla case is in no way comparable to this.

MS. TRZASKOMA: We obviously disagree with that, your Honor.

THE COURT: I find that within the four corners of the law, the initial wiretap application was more than sufficient to justify the entry of the wiretap.

Certainly there was sufficient information there to indicate that these individuals were committing or about to commit an offense that particular communications concerning the offense both in terms of identifying participants and figuring out what the participants were saying to the parents and the students would be found through the wiretap, and certainly we knew already that the phones were being used in connection with the offense.

That portion of the motion is denied.

MS. TRZASKOMA: Your Honor, the second part of our motion is with respect to the search warrants for the phones and, in particular, Mr. Person's phone.

THE COURT: After they were --

MS. TRZASKOMA: After they were arrested and the complaint.

THE COURT: Let me just add, by the way, if I fight that, in any event, the good faith exception applies here. There is no reason the agents would not see and would not understand that they were relying in good faith on the order. I don't think that defendants have made any arguments that the agents made any dishonest or reckless statements in their affidavits or otherwise that the FBI's reliance on the wiretap orders was unreasonable.

MS. TRZASKOMA: Your Honor.

THE COURT: Going on to counsel's motion to suppress the evidence obtained from the cell phones post arrest.

MS. TRZASKOMA: Your Honor, just for the record, I want to preserve that we disagree that the good faith exception applies on the Title III, which is in our papers.

THE COURT: Yes, ma'am.

MS. TRZASKOMA: With respect to the search warrant, our argument is facial invalidity, search warrants, that the search warrants on their face authorized the search of the entire contents of Mr. Person's cell phone, even though the

government had no reason to believe that anything other than the text message applications and the e-mail applications would have evidence of any potential offense.

There we are particularly relying on the Riley decision, your Honor, by the Supreme Court, which makes clear that modern-day smartphones -- of which this was one, it was an iPhone -- it had, again, every intimate detail of Mr. Person's life, it had photographs, it had web-browsing history, the kinds of very intimate details that the Supreme Court was concerned about in Riley.

The face of the search warrant makes clear that the government could look at his entire phone, even though it had no reason to believe that any relevant information would be found in anything other than the e-mail or text message applications.

Indeed, the affidavit that the government has provided to the court in opposition to our motion makes very clear that the government did, in fact, look at web-browsing history, photographs, and other information that was not connected, potentially connected to the crime.

Our argument is that, on its face, it is a general warrant and it was improper.

THE COURT: Mr. Boone, counsel says that the warrant was overbroad and the request was overbroad.

MR. MARK: Your Honor --

THE COURT: I'm sorry, Mr. Mark.

MR. MARK: Thank you, your Honor.

Just very briefly, the request here is really quite staggering that they have argued that there is no probable cause here for a search warrant of two phones that were actually the subject of the wiretap investigation here. A wiretap where some of those calls, some of those text messages are detailed specifically in the complaint that is attached to that that they had incorporated therein.

The suggestion that this is somehow overbroad and facially so also is quite staggering because of just the mere reference to the search warrant itself. It details that it meets all three particular requirements. It details the subject offenses. It details what is to be searched. Here, the specific cell phones that were the subject of the wiretap, and third, the types of evidence that they could then collect from that search warrant.

So it did not essentially allow them just to search and go through anything. It was that they could search that phone in order to look for specific evidence of the crime. That is all that is required under the Fourth Amendment and that is all that is required under Second Circuit precedent, specifically citing to the United States v. Ulbricht case, which details that you can search the entire electronic device. There it was a laptop. Same thing with a cell phone, as Judge

Kaplan recognized in Gatto, in order to look for the particular information there.

Moreover, I would just note that their suggestion that there was no probable cause to think that there would be anything other than, lets say, evidence of calls and text messages just belies all the common inferences in everyday knowledge that every agent knows and every judge knows, is that if you're communicating with one person about a specific matter -- here we're actually talking about a bribery scheme -- you might e-mail with them, text message with them, you might look up stuff on the Internet about, you know, a player or a person or do some research about that. You might make notes about that on your phone. We do use these phones in all different ways. Everybody knows that, and there clearly was probable cause for the judge to find that and for the agent to believe that.

For all those reasons, we think these warrants were obviously supported and that the agents who operated here in reliance on them did so in good faith.

Thank you.

THE COURT: Yes, counsel.

Anything to add?

MS. TRZASKOMA: Only, your Honor, that on their face, these warrants allow the government to look, to the extent they are particularized and describe categories of information to

look for, that particularization is completely undermined by the authorization to look everywhere.

In particular, paragraph 17 says, Depending on the circumstances, law enforcement may need to conduct a complete review of all the ESI from the subject device to locate all data responsive to the warrant.

That couldn't be broader. That is literally saying you can look in every nook and cranny of this person's entire life without limitation. The fact that cell phones are now so smart and contain so much information is reason why search warrants like this don't meet the probable cause standard.

THE COURT: All right. Thank you.

I disagree. First of all, Judge Forrest's opinion in the Ulbricht case says otherwise. But secondly, in this case, the agents had specific information relating to phone calls, texts, e-mails. And as counsel for the government points out, there is no reason to believe that there wouldn't be other types of information on the phone, whether it was looking up a player, whether it was any kind of address, for example, of the parents or the player. There is absolutely no reason to believe that that wouldn't be the case.

Accordingly, I find that the affidavit in fact established probable cause for the search. In addition to that, the agents certainly were acting in good faith, and there has been no suggestion otherwise. Accordingly, the motions are

denied.

What else do we want to do today, friends?

Mr. Bach?

MR. BACH: Thank you, Judge.

I think the only remaining issue goes to scheduling. We're happy to meet and confer with the government about 3500 material, motions in limine, that are productive before we waste the court's time.

There is one issue I just want to flag --

THE COURT: Yes, sir.

MR. BACH: -- and come back to.

That is with respect to the schedule for drafting jury instructions, which involves the court.

My strong suggestion here, your Honor, and I will style it as a motion or application, is to have the jury instructions for the substantive counts of federal services bribery 666 and under services fraud to have those jury instructions set forth a month or even more before the trial begins.

I know that is not the usual sequence in these cases. Usually the parties submit jury instructions and then the court reviews them and --

THE COURT: We're not doing that anyway. What we are going to do is that the government will send its draft substantive charges to you, you will review them, and then you

will send me your additions, subtractions, modifications, and the like. I'm not proofreading two sets of instructions.

The only question then is when. When you folks confer, you let me know if you disagree.

MR. BACH: I will, Judge.

Just to be clear on the record, this goes back to the points, I won't belabor them about, our concern about the vagueness of terms such as business and transaction, what some have seen of the vagueness on the services fraud statute and a suggestion in the government's brief that there are now constructions, such as the Supreme Court found in McDonald, to deal with some of these issues. I just think it is in everyone's interest if we can deal with those sooner than later.

THE COURT: But it doesn't have to be tomorrow.

MR. BACH: No, it doesn't, your Honor.

THE COURT: Do we anticipate any motions in limine, friends, or do we know?

MS. TRZASKOMA: We do anticipate some motions in limine. I don't know that we can articulate all of them.

THE COURT: Be sure, please, when you confer that you put together a schedule for that as well.

MS. TRZASKOMA: Yes, your Honor. We will.

THE COURT: What else?

MS. TRZASKOMA: Nothing further from us, your Honor.

MR. BOONE: Nothing for the government, your Honor.

It is our understanding that time has been excluded until the trial date.

THE COURT: Yes, sir. That is my understanding as well.

Is there any disagreement on that?

MS. TRZASKOMA: No, your Honor.

MR. BACH: No, your Honor.

THE COURT: Thank you, ma'am. Yes, sir. Thank you.

Thank you, counsel. Good afternoon.

(Adjourned)